

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST NEAL JR.,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2005

No. 250296

Muskegon Circuit Court

LC No. 02-047104-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Ernest Neal, Jr., of armed robbery.<sup>1</sup> The trial court sentenced defendant as a third habitual offender<sup>2</sup> to a term of ten to fifty years in prison. Defendant appeals his conviction and sentence, and we affirm.

Defendant argues that the prosecutor improperly cross-examined him regarding the nine-month period of silence between his arrest and his voluntary exculpatory statement to police in violation of defendant's post-*Miranda*<sup>3</sup> right to silence. Defendant insists that the prosecutor could question defendant about his voluntary statement to police, but could not refer to the silence in between his arrest and when the statement was made.

It is well settled that "when a defendant chooses to exercise his right to remain silent, that silence may not be used against him at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). The use of the defendant's post-arrest, post-*Miranda* silence for impeachment or as substantive evidence violates due process guaranteed by the Fourteenth Amendment, except when the silence is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001).

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 769.11.

<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Here, defendant testified that at the time of his arrest, he was completely unaware of why he was being arrested. Defendant stated that he first realized he was being wrongfully charged with the robbery on March 4, 2002, when he was in a holding cell before his preliminary examination. Defendant explained that at that time, James Sawyer, a friend and fellow jail inmate, confessed to defendant that he had committed the robbery for which defendant was charged and that the police had made a mistake in arresting defendant. Between the time he learned why he was arrested and when he made a voluntary statement to police regarding Sawyer's admission of guilt in October 2002, defendant claims he repeatedly attempted to contact police and inform the police that Sawyer committed the robbery.

In direct response to this testimony, the prosecutor elicited testimony from defendant that defendant had knowledge of Sawyer's actions on the day of the robbery, December 18, 2001, but did not come forward with this information until October 4, 2002. Defendant also admitted that he was present during his arraignment when the information and charges against him were read to him. Our Supreme Court noted in *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990):

[D]efendant cannot assert that the Fifth or the Fourteenth Amendment confers a right to create the impression, free from contradiction, that he cooperated with the police and made a statement after arrest. . . .

This is precisely the impression defendant attempted to create in this case when he testified that he did not know originally why he was arrested and did not fully understand the charges against him until nine months after his arrest. Therefore, we hold that the prosecutor properly cross-examined defendant regarding his silence, because a defendant cannot claim his right to remain silent is violated when he claims that he was trying to cooperate with police or trying to contact them with an exculpatory story. *Doyle, supra* at 619.

Defendant asserts that the trial court erred when it allowed the prosecutor to make the following comments on defendant's silence during his opening statement:

[Defendant] [d]oesn't come forward with that information until October 4, of 2002. And in that conversation with Detective Trejo after he's advised of his rights, he tells Detective Trejo: James Sawyer did this robbery, and I knew he did this robbery on the morning it happened. He told me he snatched this woman's purse. And if you believe the Defendant's story as he gives it on October 4<sup>th</sup>, he gives the following statement: He says Sawyer did the robbery. And now, ten months after the event, I've got witnesses to prove that. Doesn't say anything about these witnesses to Detective Trejo, Officer Corrigan, any of the arresting officers when he knew on that morning who actually did this robbery.

Defendant's position is that the prosecutor's comments on defendant's silence violated *Doyle, supra*, because it was not used in the context of impeaching defendant's testimony that he had tried to tell police an exculpatory story. Defendant insists that because the remarks occurred in the prosecutor's opening statement, it cannot be an impeachment of defendant's testimony at trial.

However, we find that defendant waived his right to remain silent when he made his voluntary statement to police on October 4, 2002. This Court's decision in *People v Schultz*, 172 Mich App 674; 640 NW2d 246 (1988), is instructive. In *Schultz*, the defendant argued that the prosecution violated his right to due process of law by making reference in his closing remarks to the defendant's silence and his failure to make exculpatory statements to the police. *Id.* at 682. The prosecutor in *Schultz* asked the following rhetorical question to the jury during his closing remarks: "[I]f you believe that he was so adamant on insisting on his innocence to Officer Madigan and here before you, why in heaven's name did it take him according to his own testimony, one hour and a half to tell Officer Madigan that he took the package?" *Id.* This Court held that because the defendant had provided an extensive statement to the police before trial, and then testified to the same at trial, "defendant [] freely gave up his right to remain silent." *Id.* at 684. This Court's explanation of its holding is instructive here:

[I]t was not error or denial of due process of law for the prosecution in rebuttal argument to point out that, if defendant were telling the truth when he stated he did not know that the package contained cocaine, there was no reason for defendant not to promptly inform the police that he did deliver a package. . . . We agree with the analysis of the trial court that the prosecution's argument was not that defendant "should have said something but rather, if that in fact were the truth, it wouldn't have taken him an hour and a half to get it out." [*Id.* at 684-685.]

Similarly, here, if, as defendant alleges, he knew that Sawyer committed the robbery at least nine months before giving his statement to police on October 4, 2002, then there was no explanation for why he did not come forward sooner. The prosecutor's comment on this apparent contradiction did not violate defendant's right to remain silent because, similar to the defendant in *Schultz*, defendant gave up his right to remain silent when he made his statement to police. The only difference between the present case and *Schultz* is that the prosecution referenced defendant's long delay between his arrest and his statement during his opening remarks. But here, as in *Schultz*, defendant's constitutional protections were not violated because by making the statement to police defendant waived his constitutional protection and could not claim the right was violated.

Moreover, as the trial court correctly observed, it is well-established law in Michigan that a defendant's exculpatory statements may be used against him if the prosecutor presents circumstantial evidence that the exculpatory statements were false or meant to mislead a jury. *People v Dandron*, 70 Mich App 439, 443-444; 245 N.W.2d 782 (1976). Here, the prosecutor's opening statement was a commentary on the circumstantial evidence demonstrating that defendant's exculpatory statements were false or meant to mislead the jury.

Defendant says that his right to due process and to remain silent were violated when a police detective testified that from February 16, 2002, until October 4, 2002, no one came forward with information that Sawyer committed the robbery. However, similar to the prosecutor's comments on defendant's statements to police, the detective's testimony was not offered as substantive evidence of guilt, but was instead was circumstantial evidence that defendant's testimony was false.

Accordingly, we hold that the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Affirmed.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Jessica R. Cooper